

Edson Gardner, Attorney Pro-Se.
Lynda Kozlowicz, Attorney Pro-Se.
as Kozlowicz & Gardner Advocates, Inc.,
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FILED
U.S. DISTRICT COURT

2012 MAY 29 P 1:38

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION

Honorable Clar M. Poulson,
Judge of the Duchesne County
Justice Court, and Derek
Dalton,

Plaintiff(s),

v.

Ute Indian Tribe of the
Uintah and Ouray Reservation,
Business Committee for the Ute
Tribe of the Uintah and Ouray
Reservation, Tribal Court for
the Ute Tribe of the Uintah and
Ouray Reservation, Irene C. Cuch,
in her official capacity as Chairman
of the Business Committee for the
Ute Tribe, Ronald J. Wopsock, in
his official capacity as vice-
chairman of the Business Committee
for the Ute Tribe, Frances Poowewgup,
in her official capacity as a Member
of the Business for the Ute Tribe,
Stuart Pike, Sr., in his official
capacity as a Member of the for the
Ute Tribe, Richard Jenks, Jr., in his
official capacity as a Member of the
Business for the Ute Tribe, Phillip
Chimburas, in his official capacity
as a Member of the Business for the
Ute Tribe, Honorable Tex Arrowchis,

Civil No. 212-CV-00497

INDIAN DEFENDANT'S MOTION
REQUESTING JUDICIAL NOTICE,
AND POINTS AND AUTHORITIES,
AND DECLARATION OF INDIAN
DEFENDANT GARDNER, AND
KOZLOWICZ, AS KOZLOWICZ &
GARDNER ADVOCATE, INC.,
AND SWAIN, AND REED AND
CUCH IN SUPPORT OF MOTION
REQUESTING JUDICIAL NOTICE

Judge, Brooke C. Wells

in his official capacity as Chief Judge of the Ute Trial Court, Dean Reed, and Janet Cuch, and Lynda Kozlowicz, Edson Gardner, Kozlowicz & Gardner Advocate, Inc., a Ute Tribe Business License, and Athenya Swain.

Defendant(s),

Now Comes, Defendant Edson Gardner, Attorney Pro-Se, and Lynda Kozlowicz, Attorney Pro-Se, as Kozlowicz & Gardner Advocate, Inc, and Athenya Swain, Attorney Pro-Se, and Dean Reed, Attorney Pro-Se, and Janet Cuch, Attorney Pro-Se; files Defendant's Motion Requesting Judicial Notice, And Points And Authorities, And Declaration Of Indian Defendant Gardner, And Kozlowicz, As Kozlowicz & Gardner Advocate, Inc., And Swain, And Reed And Cuch In Support Of Motion Requesting Judicial Notice, Pursuant to Federal Rules of Evidence.

I. TO PLAINTIFFS AND TO THEIR ATTORNEY OF RECORD:

1. Pursuant to Federal Rules of Evidence 201(c)(f), the Duchesne County Plaintiff, Hon. Poulson, Judge of Duchesne County Justice Court, and Dalton, Duchesne County Sheriff's Dept., and Defendant Edson Gardner, Uinta Indian Descendant, Attorney Pro-Se, and Lynda Kozlowicz, Ute Tribal Member, Attorney Pro-Se, as Kozlowicz & Gardner Advocates, Inc., and Athenya Swain, Ute Tribal Member, Attorney Pro-Se, and Dean Reed, Ute Tribal Member, Attorney Pro-Se, and Janet Cuch Tribal Advocate, are respectfully requesting that in

connection with opposing and reply, this Court take judicial notice of United States District Court records and files from this case and related cases previously and now pending in Federal District Court for Central Division of the District of Utah that involves same real property, same or similar parties, and issues and contentions that are same or similar to issues and contentions raised by Defendants. This request is based upon this written motion and Declaration of Plaintiff's attorney herein.

II. POINTS AND AUTHORITIES

2. Plaintiff Clair M. Poulson, Judge of Duchesne County Justice Court, and Derek Dalton, Deputy Sheriff of Duchesne County officials of Utah, are usual actions annd grounds they have acted beyond their authority, or under legally invalid authority. To determine whether they are immune from action, it is necessary to decide merits of claim. Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 114 F. 3d 1513 (10th Cir. 1997).

3. Defendant Ute Tribal Court exhaustion in this action is not required, because it is plainly lacking jurisdiction, as in Ninth Circuit Court of Appeals, decrees, Ricon Mushroom Coporation of America v. Mazzetti, Case No. 10-56521 (dated April 20, 2012) (**attached herein**).

4. Federal Rules of Evidence 201(c) authorizes federal court to take judicial notice of an adjudicative fact upon party's request. Defendants respectfully submits documents as to which judicial notice is being requested are clearly relevant to issues and contentions presented by this Complaint for Declaratory and Injunctive Relief.

5. Named Defendant, Ute Tribal Court retained Indians inherent power to protect Indian self-government and to control Indian internal relations and affairs, which United States Supreme Court in, Montana v. United States, 450 U.S. 544 (1981), described quite narrowly as including power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members and non-Indians on their reservation, and to prescribe rules of inherence for members. The Court stated:

exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

6. Defendant Ute Tribal Court jurisdiction over Native American Indian's civil action against Non-Indian defendant is within action in which Ute Indian Tribe seeks civil penalties and an order of restitution from defendant, Elliott v. White Mountain Apache Tribal Court, 566 F. 3d 842 (9th Cir. 2009),

after signal fire Non-Indian had set on trust land to facilitate her rescue while she was lost grew into substantial fire that caused extensive damages on that reservation. The Uintah and Ouray Reservation natural resources and under principles of comity, the federal courts must decline to entertain Non-Indian defendant's action for injunctive and declaratory relief against Ute Tribal court, and Hon. Tex S. Arrowchis, Ute Tribal Judge, or Ute Tribal Court. Plaintiffs challenging Ute Tribal Court's jurisdiction, the Non-Indian Defendant must exhaust remedies first in Ute tribal Court.

7. In this case, Defendant Tribal Court has jurisdiction over claim by Indian Defendant, the Bank (Non-Indian) South Dakota Corporation and principle place of business outside Indian reservation, discriminated against Indians, based on either Indian ancestry or Tribal affiliation, in terms of loans by Bank made to Indian family-owned Corporation, because claim satisfied requirements for first category of permissible tribal jurisdiction over Non-members recognized as Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008), Non-Indian Bank had formed consensual relationship with Indians, by virtue of loans to Indian Corporation whose overwhelming Indian character clearly benefited Non-Indian Bank (through loan guarantees by Bureau

of Indian Affairs greatly reduced Bank's risk) and Non-Indian bank's commercial relationship with Indian Corporation to Individual Indian owners, and tribal tort law invoked by Indian's is appropriate and other means to regulating activities of non-Indians have some nexus to consensual relationship, given discrimination claim arose directly from pre-existing commercial relationship between Indians and Non-Indian Bank and sought to hold Non-Indian such as Bank, to minimum standard of fairness when voluntarily deal with non-Indians.

III. DECLARATION OF INDIAN DEFENDANT GARDNER, AND KOZLOWICZ, AS KOZLOWICZ & GARDNER ADVOCATE, INC., AND SWAIN, AND REED AND CUCH IN SUPPORT OF MOTION REQUESTING JUDICIAL NOTICE

8. I, Edson Gardner, and Lynda Kozlowicz, and Athenya Swain, and Dean Reed, and Janet Cuch declare;

9. Defendant Gardner, and Kozlowicz, as Kozlowicz & Gardner Advocates, Inc., and Janet Cuch, Advocate are admitted to practice law within Ute Indian Tribal Court of Utah and now before Federal Court as Attorney Pro-Ses.

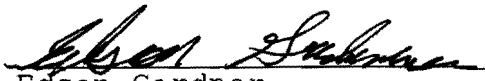
10. Defendant Kozlowicz & Gardner Advocates, Inc., and Janet Cuch are Ute Tribal Advocates of record in Ute Tribal Court and now are Attorney Pro-ses in federal Court.

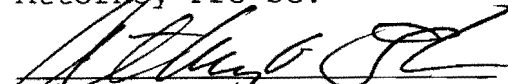
11. Indian Defendants in this Action requests this United States District Court to take Judicial Notice of


following related declarations pleading, motion, and order filed and issued by Federal District Court for Central Division of Utah.

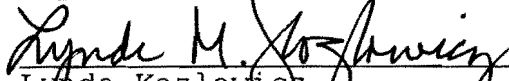
12. DECLARATION OF DEFENDANTS IN OPPOSITION TO DEFENDANTS AND TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR LACK OF JURISDICTION AND FAILURE TO EXHAUST TRIBAL REMEDIES, filed in United States District Court, and Ute Tribal Court actions, as true and correct thereof being and fully stated by this reference.

Respectfully submitted this day 29 of May 2012.


Edson Gardner,
Attorney Pro-Se.


Athenya Swain,
Attorney Pro-Se.


Janet Cuch,
Attorney Pro-Se.


Lynda Kozlowicz,
Attorney Pro-Se.

NA
Dean Reed,
Attorney Pro-Se.

FILED

NOT FOR PUBLICATION

APR 20 2012

UNITED STATES COURT OF APPEALS

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

**RINCON MUSHROOM CORPORATION
OF AMERICA, a California corporation,**

Plaintiff - Appellant,

v.

**BO MAZZETTI; JOHN CURRIER;
VERNON WRIGHT; GILBERT
PARADA; STEPHANIE SPENCER;
CHARLIE KOLB; DICK
WATENPAUGH,**

Defendants - Appellees.

No. 10-56521

**D.C. No. 3:09-cv-02330-WQH-
POR**

MEMORANDUM*

**Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding**

**Argued and Submitted April 12, 2012
Pasadena, California**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: SILVERMAN and RAWLINSON, Circuit Judges, and TUNHEIM, District Judge.”

Appellant Rincon Mushroom Corporation of America (RMCA) challenges the district court’s dismissal of RMCA’s Complaint for failure to exhaust tribal remedies. RMCA argues that exhaustion is not required in this case because the tribal court plainly lacks jurisdiction. We agree, and reverse the district court.

In this case, exhaustion is not required because “it is ‘plain’ that tribal court jurisdiction is lacking, so that the exhaustion requirement ‘would serve no purpose other than delay.’” *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). A tribal court plainly lacks jurisdiction where the basis of jurisdiction is not “colorable” or “plausible.” *Id.* at 848 (citation omitted).

“As a general rule, . . . the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329 (2008) (citation and internal quotation marks omitted). In this case, it is *Montana*’s second exception to this general rule that is at issue. *See Montana v. United States*, 450 U.S. 544, 566 (1981). Under *Montana*’s second exception, “a tribe may

” The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

exercise ‘civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .’” *Plains Commerce*, 554 U.S. at 329-30 (quoting *Montana*, 450 U.S. at 566). In evaluating whether this case plainly falls outside of the scope of *Montana*’s second exception, we must keep in mind that “[t]hese exceptions are limited ones, and cannot be construed in a manner that would swallow the rule, or severely shrink it . . .” *Id.* at 330 (citations and internal quotation marks omitted).

The Tribe argues that the non-member fee land at issue could potentially contaminate the Tribe’s water supply, or exacerbate a future fire that might damage the Rincon Casino. However, these possibilities do not fall within *Montana*’s second exception, which requires actual actions that have significantly impacted the tribe. *Compare id.* at 341 (“The sale of formerly Indian-owned fee land to a third party . . . cannot fairly be called ‘catastrophic’ for tribal self-government. . . .”) (citation omitted); and *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59 (1997) (ruling that tribal court jurisdiction over tort suits is not “needed to preserve the right of reservation Indians to make their own laws and be ruled by them”) (citation and internal quotation marks omitted), with *Elliott*, 566 F.3d at 844, 849-

50 (holding that the tribal court had colorable jurisdiction where a non-Indian started a forest fire on reservation land).

To hold that the potential threats of harm presented on this record¹ give rise to tribal jurisdiction under *Montana*'s second exception would allow the exception to swallow the rule; any property within the Rincon Reservation faces similar potential threats. *See Plains Commerce*, 554 U.S. at 330. Because the potential threats did not create a plausible basis for tribal court jurisdiction, the district court erred when it dismissed RMCA's Complaint for failure to exhaust tribal remedies. *See Elliott*, 566 F.3d at 848.²

REVERSED and REMANDED.

¹At oral argument, counsel for the Tribe urged us to send this case to the tribal court to afford the Tribe an opportunity to produce additional evidence in support of tribal jurisdiction. However, the Tribe had the burden to show tribal jurisdiction in the district court proceedings. *See Plains Commerce*, 554 U.S. at 330 ("The burden rests on the tribe to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. . . .") (citation omitted).

²Our ruling here renders moot the district court's decision to dismiss the case rather than staying it.

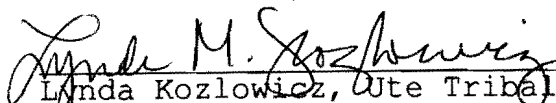
CERTIFICATION OF SERVICE

This is to certify true and correct copy of INDIAN DEFENDANT'S MOTION REQUESTING JUDICIAL NOTICE, AND POINTS AND AUTHORITIES, AND DECLARATION OF INDIAN DEFENDANT GARDNER, AND KOZLOWICZ, AS KOZLOWICZ & GARDNER ADVOCATES, INC., AND SWAIN, AND REED AND CUCH IN SUPPORT OF MOTION REQUESTING JUDICIAL NOTICE, foregoing document was delivered by mail first class, postage prepaid and addressed as follows on this 29, day of May, 2012.

Jesse C. Trentadue
Carl F. Huefner
Noah M. Hoagland
Britten R. Butterfield
SUITTER AXLAND, PLL
8 EAST BROADWAY, SUITE 200
Salt Lake City, Utah 84111

Ute Tribal Business
Committee Members
Post Office Box 190
Fort Duchesne, Utah 84026

Ute Tribal Court
Judge Tex Arrowchis
P.O. Box 190
Fort Duchesne, Utah 84026


Lynda Kozlowicz, Ute Tribal Member,
Attorney Pro-Se.

Edson Gardner, Attorney Pro-Se.
Lynda Kozlowicz, Attorney Pro-Se.
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Athenya Swain, Attorney Pro-Se.
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U.S. DISTRICT COURT


May 29, 2012.

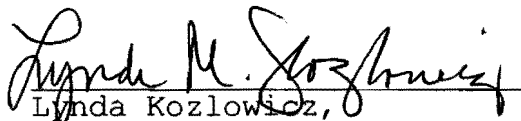
U.S. District Court
Office of the Clerk
350 South Main Street, Suite 150
Salt Lake City, Utah 84101-2180

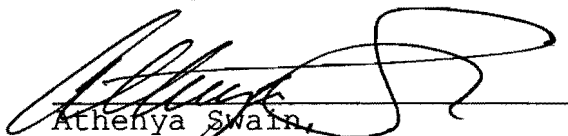
Re; Poulson v. Ute Indian Tribe, Case No. 2:12-CV-00497

The following INDIAN DEFENDANT'S MOTION REQUESTING JUDICIAL NOTICE, AND POINTS AND AUTHORITY, AND DECLARATION OF INDIAN DEFENDANT GARDNER, AND KOZLOWICZ, AS KOZLOWICZ & GARDNER ADVOCATES, INC., AND SWAIN, AND REED AND CUCH IN SUPPORT OF MOTION REQUESTING JUDICIAL NOTICE, is submitted for filing and review with United States District Court of Utah. Please stamp and filing.

Respectfully submitted.



Edson Gardner,
Attorney Pro-Se.


Lynda Kozlowicz,
Attorney Pro-Se.


Athenya Swain,
Attorney Pro-Se.

NA

Dean Reed,
Attorney Pro-Se.


Janet Cuch,
Attorney Pro-Se.